No. 80-126

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OUTBOARD MARINE CORPORATION,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, UNITED STATES OF AMERICA,

and

MONSANTO COMPANY,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether Congress in the Clean Water Act has preempted the entire field of federal common law of nuisance as it applies to pollution of interstate navigable waters.

2. Whether the jurisdiction of a district court to hear a claim based on federal common law of nuisance is dependent on the geographical location of the parties.

3. Whether a state can intervene as of right or as matter of discretion in an action brought by the United States under the Clean Water Act alleging continuing pollution when the United States has not specifically asked the court to enjoin future discharges.

4. Whether a state can bring a federal common law of nuisance action when the United States has instituted an action under the Clean Water Act.

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The opinion of the court of appeals is reported as *People of the State of Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980)

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 1331(a)

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States,. . . .

Rule 24(a) and (b), Federal Rules of Civil Procedure.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order,

requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

On August 10, 1978, the People of the State of Illinois ("State" or "Illinois") filed suit in United States District Court for the Northern District of Illinois against Outboard Marine Corporation ("OMC"), a Delaware corporation with facilities located in Waukegan, Illinois, some ten miles south of the Wisconsin border. The complaint alleged that from 1959 through 1978 OMC discharged highly toxic polychlorinated biphenyls ("PCBs") from its facility into the North Ditch, Waukegan Harbor and Lake Michigan, interstate and navigable waters. It alleged that these PCBs had accumulated in the bottom sediments of the receiving waters (which Illinois owns in trust for the people) comprising as much as 25 per cent of these sediments. It further alleged that OMC's pollution damaged water quality, and aquatic and bird life (which Illinois also owns in trust for the people), harmed the health and welfare of the people and impaired the usefulness of Waukegan Harbor and Lake Michigan as public water supplies and recreation areas for citizens of Illinois and of the other states surrounding Lake Michigan. (R1, Item 1)[1]

The complaint alleged two federal claims—federal common law of nuisance and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Jurisdiction was invoked under 28 U.S.C.

[1] As used herein "R1" refers to the record in the first appeal (Seventh Circuit No. 79-134), "R2" refers to the record in the second appeal (Seventh Circuit No. 79-1725), and "App." refers to Petitioner's Appendices.

§ 1331(a) and 33 U.S.C. § 1251 *et seq.* Illinois also included several pendent state claims. On motion of OMC the court dismissed the action. (App. D-1) It dismissed the claim under the Clean Water Act on the ground that Illinois had not given sixty days notice of the suit. See 33 U.S.C. § 1365(b)(1)(A). (App. D-3) The federal common law of nuisance count was dismissed for failure to state a claim because there was "no allegation of injury to or from another state." (App. D-4) Illinois filed a timely appeal in the court of appeals pursuant to 28 U.S.C. § 1291 on the nuisance claim but did not appeal the dismissal of the Clean Water Act claim. (R1, Item 23)

When Illinois' own suit was dismissed, the State petitioned to intervene in a suit filed on March 17, 1978, by the United States against OMC, then pending before the same district judge (the two cases had been previously consolidated for discovery). The United States' suit alleged basically the same facts as Illinois' suit and was based on the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, the Clean Water Act, and federal common law of nuisance. (R2, Item 1) Although alleging continuing pollution, the United States' prayer for relief only asked for the specific relief of studies and dredging of the contaminated sediments. OMC's motion to dismiss had earlier been denied. (R2, Item 21) Illinois claimed intervention as of right under the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) and thus under Rule 24(a)(1) of the Federal Rules of Civil Procedure, intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. (R2, Item 59) The district court rejected Illinois' claims on all three grounds. (App. C-1) Illinois filed a timely appeal in the court of appeals pursuant to 28 U.S.C. § 1291. (R2, Item filed January 22, 1979) The two appeals were consolidated by the court on its own motion. The United States filed an amicus curiae brief in support of Illinois' intervention. On February 28, 1980, a unanimous panel of the

court reversed and remanded in both cases. 619 F.2d at 623. OMC's motion for rehearing and suggestion for rehearing in banc was denied on April 29, 1980. (App. B-1) OMC filed its petition for writ of certiorari on July 28, 1980.

REASONS FOR DENYING THE WRIT

The court of appeals in a well-reasoned opinion thoroughly considered the issues raised and reached a correct decision. As is discussed below, the reasons OMC advances in support of the writ do not result from the court's decision and are not sufficient grounds for this court to grant a writ of certiorari to review the Seventh Circuit's decision.

I.

THE ISSUES PRESENTED IN THIS CASE ARE NOT RIPE FOR SUPREME COURT REVIEW.

The action brought by Illinois in the district court was dismissed on the pleadings on the ground that the complaint failed to state a claim upon which relief could be granted. (App. D-4) Illinois' claim was grounded in federal common law of nuisance and alleged that from 1959 through 1978 OMC discharged highly toxic polychlorinated biphenyls ("PCBs") into the North Ditch, Waukegan Harbor and Lake Michigan. (R1, Item 1, pp. 1-5) In its prayer for relief it requested the court to enjoin further discharges and to order OMC to remove contaminated sediments in these polluted bodies of water. (R1, Item 1, pp. 13-15) The dismissal was reversed by the court of appeals and the cause was remanded for trial. 619 F.2d at 632.

Since 1978 the suit brought by the United States against OMC has been pending before the same district judge. That action is grounded in part on federal common law of nuisance and alleges the same basic facts as are alleged in Illinois' suit. (R2, Item 1) (This is the action in which Illinois attempted to

intervene when its own suit was dismissed.) OMC's motion to dismiss was denied in that case and the case continues. (R2, Item 21) As is discussed more fully below, there are no specific federal or state effluent standards governing OMC's discharges of PCBs. Much of the relief sought is not based in statute. As the Court recognized in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), it will be up to the district judge to formulate the standards to be applied in this situation and to fashion appropriate equitable relief. 406 U.S. at 103 n.5 and at 108 n.10.

On this review all this Court can decide are narrow legal issues based solely on the pleadings. The issues of whether the discharge of PCBs have created a public nuisance, of what effect this pollution has had, of what standards should apply, of where the equities lie and of what relief is appropriate cannot be decided here.

It would promote judicial economy for the Court to deny its writ of certiorari at this time. The district judge will make his ultimate decision in the ongoing federal case (in which Illinois is now an intervenor as a result of the Seventh Circuit's decision) based on the same allegations, evidence and arguments as he would in Illinois' case. (At this time the two cases have been consolidated for discovery [R2, Order dated October 12, 1978] and the judge has indicated that he will consolidate them for trial [R2, Item 21, pp. 7-8].) Once the district judge has heard the evidence and arguments of the various parties and reached a decision, the case would be in a position for this Court to review all the issues raised. To grant a writ of certiorari now would be to grant only peicemeal review.

II.

THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE ANY CONFLICT WITH CONGRESSIONAL POWERS.

Since *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), the federal courts have developed a specialized common law "when there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Illinois* v. *Milwaukee,* 406 U.S. at 105 n.6. Most often the courts have developed this common law to fill interstices in various types of federal legislation. See Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U.L.Rev.383 (1964) and Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U.Pa.L.Rev.797 (1957).

In *Illinois* v. *Milwaukee* this Court formulated a federal common law of public nuisance for pollution of interstate or navigable waters. The Court examined the various federal statutes and found that Congress had not provided the relief sought by Illinois for pollution of Lake Michigan, 406 U.S. at 103. But as the Court recognized, this does not limit the relief a federal court can grant, 406 U.S. at 103—citing *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957).

The Court recognized that Congress could at some future time preempt the entire field of federal common law of nuisance, 406 U.S. at 107. It found that Congress had not done so. In an air pollution case decided the same day the Court recognized that Congress could preempt certain areas of federal common law of nuisance and not others. *Washington* v. *General Motors Corp.,* 406 U.S. 109 (1972). Indeed, that is the main function of federal common law, to fill in the gaps.

OMC devotes several pages of its Petition in describing the intricacies of the Clean Water Act. Nowhere can it find any express intent to preempt the federal common law of nuisance—there is none. The intent of Congress is just the opposite. Since this Court's 1972 decision in *Illinois* v. *Milwaukee*, Congress has enacted two major amendments to the Clean Water Act, in 1972 (P.L. 82-500) and in 1977 (P.L. 95-217). In the 1972 amendments Congress created an express private right of action, the Citizen Suit provision. 33 U.S.C. § 1365. It was reenacted in the 1977 amendments. In doing so Congress included a savings clause which expressly preserved all common law right:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).
> 33 U.S.C. § 1365(e)

Congress could not have been more clear.

Despite the unequivocal language of the statute, OMC argues that the Clean Water Act somehow implies that Congress intended to preempt federal common law of nuisance. As this Court has noted: "the legislative grant of a new right does not ordinarily cut off or preclude other non-statutory rights in the absence of clear language to that effect." *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.* 394 U.S. 404, 412 (1969). The clear language of Congress in the Clean Water Act is just the opposite from what OMC argues.

OMC never identifies what specific provisions of the Clean Water Act this lawsuit conflicts with because there is no conflict. In its Petition it admits: "there have never been effluent standards governing the discharge of PCBs from an aluminum die case facility. . . ." (OMC's Petition, p. 2) Illinois' complaint alleges that from January 1, 1959, to August 10, 1978, OMC discharged highly toxic PCBs into the North Ditch, Waukegan

Harbor and Lake Michigan. It prayed that further discharges be enjoined and that OMC be ordered to remove the contaminated sediments. The 1972 and 1977 amendments to the Clean Water Act do not directly address OMC's pollution prior to that time. There have never been any specific effluent standards for OMC's discharges of PCBs. The relief sought by Illinois is not provided for in federal statutes. The National Pollutant Discharge Elimination System ("NPDES") permit program was not enacted until 1972, and OMC's first NPDES permit was not issued until 1975.[2] Perhaps the Clean Water Act provides Illinois a remedy for current violations (though OMC has not stated how), but it provides none to remedy the effects of OMC's past pollution. This situation falls within the same sort of gap in federal legislation as was present in *Illinois* v. *Milwaukee.*

Despite the involvement of an exotic toxic chemical, what Illinois has brought is an action in public nuisance, an action known to the Anglo-American courts for centuries. It is probably the only remedy the state has. The case arises under federal law because it involves pollution of interstate and navigable waters. *Illinois* v. *Milwaukee.* The decision below does not conflict with anything Congress has promulgated; as Judge Wisdom wrote for the court below, the very purpose of such an action is to "fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters. . . ." 619 F.2d at 630.

OMC's argument that the court of appeals' decision violates separation of powers and infringes on the power of Congress rests on nothing. There is no conflict. There is no

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[2] Interestingly, OMC's current NPDES permit, which allows no discharge of PCBs, is being appealed by OMC before a state administrative agency on the ground, among others, that there can be no PCB limit in the permit because there are no state or federal effluent standards for PCBs applicable to OMC. *OMC* v. *Illinois Environmental Protection Agency,* filed with the Illinois Pollution Control Board (Docket No. 79-141) on July 11, 1979.

usurption of Congressional power. There is no need for this Court to grant its writ of certiorari; this matter belongs before the district court where, based on the law and evidence, it can decide this case.

III.

THERE IS NO ACTUAL CONFLICT BETWEEN THE HOLDING OF THE SEVENTH CIRCUIT AND THOSE OF THE FOURTH AND EIGHTH CIRCUITS.

OMC urges this Court to exercise its discretion to review the Seventh Circuit's decision because of what it claims is a conflict among the circuits. That conflict is more illusory than real. The two cases cited by OMC, *Committee for the Consideration of Jones Falls Sewage System* v. *Train,* 539 F.2d 1006 (4th Cir. 1976) and *Reserve Mining Co.* v. *EPA,* 514 F.2d 498 (8th Cir. 1975), are easily distinguishable. The Seventh Circuit recognized the significant differences: "Those two decisions are distinguishable in that in each case the court found that the pollution had only an intrastate effect. Here, of course, the four states bordering on Lake Michigan are all affected ...." 619 F.2d at 629.

The differences between the cases are significant. In *Jones Falls* there was no allegation of any effect outside of Maryland, 539 F.2d at 1009, nor was there any evidence of extra-territorial harm, 539 F.2d at 1009. Here Illinois alleged the pollution of the North Ditch, Waukegan Harbor and Lake Michigan, interstate and navigable waters. (R1, Item 1, pp. 3-5) As well as alleging injury to the state, Illinois also alleged that OMC's pollution has seriously impaired the usefulness of Waukegan Harbor and Lake Michigan as public water supplies and as places of recreation for other states as well. (R1, Item 1, paragraphs 6, 7, 8, and 17.) These factors were not present in *Jones Falls.* Additionally, *Jones Falls* involved private plaintiffs. 539 F.2d at 1007. The court gave great weight to the lack

of any rights of a state being involved. 539 F.2d at 1010. Here, of course, the plaintiff is the State of Illinois alleging injury to its quasi-sovereign rights and to its citizens.

Reserve Mining is similarly distinguishable. That court found that there was no allegation of any interstate effect of the air pollution complained of in that case. 514 F.2d at 520-521. Here there are allegations of interstate pollution. In a factual situation more similar to OMC, pollution of Lake Superior, the Eighth Circuit chose not to decide the issue of federal common law nuisance, but relied solely on the Federal Water Pollution Control Act (Clean Water Act). 514 F.2d at 532.

There is no conflict between the holding of the Seventh Circuit and the holdings of the Fourth and Eighth Circuits. This court should not grant its writ of certiorari to review hypothetical disagreements among the circuits or conflicts in dicta.

IV.

THE SEVENTH CIRCUIT'S DECISION DOES NOT BROADEN THE JURISDICTION OF THE DISTRICT COURTS.

The decision below does not extend the decision of this Court in *Illinois* v. *Milwaukee,* but is entirely consistent with it. There is only one factual difference between the two cases—the geographical location of the polluter. The plaintiff is the same, the State of Illinois. The claim is the same, water pollution. The same federal interest in uniformity is present. Even the water is identical, Lake Michigan. An accident of geography (OMC is located approximately 10 miles from the Wisconsin border) does not determine whether an action arises under the laws of the United States. Indeed, in *Illinois* v. *Milwaukee* the federal court has jurisdiction because of the federal interest in providing uniformity and consistency in controlling water pollution in interstate and navigable waters, not because of the

geographical location of the parties. The same basis of jurisdiction exists here. OMC's argument that something like diversity must exist leads to absurd results and defeats the uniformity described by the Court in *Illinois* v. *Milwaukee*. It would indeed be anomolous if state law applied to pollution of Lake Michigan if Illinois sues but federal law applies if Wisconsin sues for the same pollution. The decision does not expand the jurisdiction of the district courts under 28 U.S.C. § 1331(a).

Yet OMC sees the Seventh Circuit's decision as opening the federal courts to any sort of pollution case. Its absurd example is a person suing his neighbor over smoke from a barbecue grill. (OMC's Petition, P. 22) Despite OMC's interpretation, the court below certainly did not hold that "all air and navigable water pollution cases involve a federal question." (OMC's Petition, p. 23) The court's holding is significantly narrower.

Most obviously this case does not deal with air pollution. However one might want to speculate about the limitations of federal common law of nuisance of air pollution, there was no allegation of air pollution, no evidence as to air pollution and no decision of either the district court or the court of appeals as to air pollution. That question was not raised in this case and cannot properly be before this Court.

Secondly, the decision below has nothing to do with whether any person can sue anyone for pollution. This is an action grounded in a traditional Anglo-American tort—public nuisance. Over the centuries the courts have developed limitations as to who can bring such an action. Certainly a state can. That is what the court decided. 619 F.2d at 623-624. Whether a person other than a state may bring such an action was not before the court and was not decided by it.

Nor does the decision below preempt all state pollution laws as OMC claims (OMC's Petition, p. 23). This was not an issue below; Illinois has no specific effluent standards governing

discharge of PCBs. Federal common law of nuisance is intersticial—it fills in the gaps in Congress' enactments. As such it can no more preempt state law, common law or statutory, than the federal statute which it complements. It is clear that Congress, which could have displaced federal common law of nuisance and could have preempted conflicting state laws, has specifically not done so. The Clean Water Act allows a state to adopt, by statute, regulation or common law decision, and to enforce more stringent standards than the federal ones. 33 U.S.C. § 1370. The Seventh Circuit's decision has no effect on that.

The possible effects of the decision below are much narrower than OMC advances. Since *Illinois* v. *Milwaukee* was decided in 1972, there have not been many reported cases involving the federal common law of nuisance of water pollution; Illinois doubts that the Seventh Circuit's decision will add many more. Certainly the decision does not expand the jurisdiction of district courts and will not result in the dire consequences OMC predicts. The decision does not open the federal courts to any pollution case brought by any plaintiff against any defendant. For these reasons the Court should not grant a writ of certiorari to review this matter.

V.

THE SECOND APPEAL PRESENTS NO ISSUE SIGNIFICANT ENOUGH TO WARRANT SUPREME COURT REVIEW.

In the second of these two consolidated appeals the court of appeals held that Illinois had a right under the Clean Water Act and F.R.Civ.P. 24(a)(1) to intervene in the suit brought by the United States against OMC. The question presented was a very narrow one and the holding is confined to the facts of that case. The Clean Water Act allows a citizen, such as Illinois, to intervene as of right when the United States has brought an

action to require compliance with a standard, limitation or order established under the Clean Water Act. 33 U.S.C. § 1365(b)(1)(B). The United States alleged that OMC was violating such a standard or limitation. The only real question arose because, although the United States had alleged continuing pollution, it had not specifically prayed that the court enjoin these ongoing discharges but had asked that OMC be ordered to remove contaminated sediments from the North Ditch and Waukegan Harbor. The narrow question decided was whether the wording of the prayer for relief meant that the action was one "to require compliance." The court of appeals held that the wording of the prayer for relief did not prevent the action from being one "to require compliance" and that Illinois did have a statutory right to intervene under the Clean Water Act. 619 F.2d at 630-632. It did not hold as OMC claims that any person has a right to intervene in any action brought by the United States. The issue was very narrow and will probably never reoccur. OMC admits that what it is asking is for this Court to interpret "boilerplate" language in the complaint filed by the United States. See OMC's Petition, p. 27. The question is not important enough for this Court to review.

The Seventh Circuit was clearly correct in its decision. Because it decided the issue on the ground of intervention as of right under the Clean Water Act and F.R.Civ.P. 24 (a)(1), it did not reach the alternate grounds advanced by Illinois, intervention as of right under Rule 24(a)(2) or by permission under Rule 24(b)(2). Although the court of appeals did not have to reach these issues, its discussion of the practicability and desirability of Illinois' intervention in the suit indicates that it may well have sustained intervention on these alternate grounds. See 619 F.2d at 631-632. The court pointed out that state-issued permits would be necessary to accomplish the relief sought by the United States. 619 F.2d at 632. (Indeed, the United States prayed that any dredging be approved by the Illinois Environmental Protection Agency, [R2, Item 1, pp. 7-

8].) When to this is added Illinois' ownership of the submerged lands in question (43 U.S.C. § 1311) and its role as trustee of these lands for the benefit of the people *(Illinois Central Railroad Co.* v. *State of Illinois,* 146 U.S. 387 [1892], *People ex rel. Scott* v. *Chicago Park Dist.,* 66 Ill.2d 65, 360 N.E.2d 773 [1976], and Ill. Rev. Stat. 1977, ch. 19, § 150-151), Illinois' intervention would have been properly allowed on these alternate grounds.

As a final issue in this second appeal, OMC claims that the court of appeals erred in allowing the state to pursue its own independent common law action as well as to intervene in the statutory one brought by the United States. (OMC's Petition, pp. 28-30) Its argument is without any merit. The citizen suit provision of the Clean Water Act does prohibit a person from filing his own suit if the United States has initiated an action (but the citizen can then intervene as of right). 33 U.S.C. § 1365. However, as is clear from the statute, in such circumstances the citizen cannot initiate his own action *under that section;* there is no bar to any other type of action. The provision specifically states that "nothing in this section shall restrict any right which any person (or class of persons) may have under any statute *or common law* to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e) [emphasis supplied] By its own terms the Act permits simultaneous actions—one brought by the United States under the Clean Water Act and another brought by a citizen under common law. The court of appeals properly allowed Illinois to intervene in the suit brought by the United States and to maintain its own common law action. The decision of the court was entirely consistent with the statute.

As discussed above, the Seventh Circuit's decision in the second appeal was correct, would be sustained on alternate grounds and is fair. There is no issue in this case significant enough for this Court to review. The writ should be denied as to the second appeal.

CONCLUSION

For the foregoing reasons the People of the State of Illinois submits that the Court should deny the writ of certiorari.

Respectfully submitted

PEOPLE OF THE STATE OF ILLINOIS

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